

INTERNATIONAL PROTECTION OF MINORITIES RIGHTS AND ISLAMIC LAW: A COMPARATIVE STUDY

Nehaluddin Ahmad and Arman bin Haji Asmad*

I. INTRODUCTION

The essence of democracy is majority rule, the making of binding decisions by a vote of more than one-half of all persons who participate in an election. However, constitutional democracy in our time requires majority rule with minority rights. Thomas Jefferson, third President of the United States, expressed this concept of democracy in 1801 in his First Inaugural Address. He said, “All . . . will bear in mind this sacred principle, that though the will of

* Nehaluddin Ahmad, MA, LL.B., LL.M. (Lucknow University, India), LL.M. (Strathclyde University, UK), LL.D. (Meerut University, India). Professor of Law, Sultan Sharif Ali Islamic University (UNISSA), Brunei Darussalam. Email: ahmadnehal@yahoo.com (Lead Author). Arman bin Haji Asmad, PhD (Malaysia), MA (Jordan), BA (Egypt). Assistant Rector, Sultan Sharif Ali Islamic University (UNISSA), Brunei Darussalam (Second Author).

the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect and to violate would be oppression.”¹

In every genuine democracy today, majority rule is both endorsed and limited by the supreme law of the constitution, which protects the rights of individuals. The concept of majority rule and respect for minority rights is demonstrated in several Constitutions of world such as American and Indian constitutions. Oppression by majority over the minority is barred by articles of the respective constitution. Today mostly, democracy is a way of government of the people which is ruled by the people. Democracies understand the importance of protecting the rights, cultural identities, social practices, and religious practices of all individuals². In order for the people’s will to govern, a system of

¹ Thomas Jefferson, *The Papers of Jefferson*, 17 February to 30 April 1801, Volume 33, 148 (2006).

² UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), ICCPR.

majority rule with respect to minority rights has been put into place.

“Minorities” and its inseparable accompaniment “minority rights” are the most complex notions around the world, and despite all theoretical assertions, have so far escaped any distinct definition that may be applicable universally. The concept of “minorityism” reflects a phenomenon of uncertainty and inferiority³ which a particular section of society may face because of a variety of reasons, and, therefore, the measures, legal or otherwise initiated by the state to eliminate this complex is generally termed as “minority rights.”⁴

In the contemporary world which is characterized as a global village, “minority rights” which are the direct outcome of multiculturalism are

³ Some scholars argue that although the use of the term “inferior” is meant to indicate that numerical minority position of the group is required, a neutral term with no undesirable connotations would have been suitable. See generally, Kristin Henrard, *Devising an Adequate System of Minority Protection*, (2000) 33; G. Gilbert, *The Legal Protection Accorded to Minority Groups in Europe*, 23 NETHERLANDS YEAR BOOK INT’L L. 73 (1992).

⁴ *Ibid.*

on the political agenda of almost all the states.⁵ It has been necessitated because the fastest ever means of transport and communication have brought into the national boundaries of other states new ethnic, religious and linguistic groups - each of them struggling to preserve its identity, and seeking the protection from the state concerned for this purpose. To cope with this problem, and to accord the required guarantees to such groups, almost every government of the world has taken certain affirmative measures, which in brief are termed as “minority rights,” and the whole social structure which emerges from this pluralistic ethos is known as “minorityism.”⁶

Today, issues related to the rights of persons belonging to minorities may be found in nearly every human rights instrument and forum. The United Nations and other intergovernmental organizations recognize that minority rights are essential to protect those who wish to preserve and develop values and

⁵ Malcom N. Shaw, *The Definition of Minorities in International Law*, THE PROTECTION OF MINORITIES & HUMAN RIGHTS (1992), at 25.

⁶ Philip Vuciri Ramaga, *Relativity of the Minority Concept*, 14 Human Rights Q. 117 (1992).

practices which they share with other members of their community. They also recognize that members of minorities make significant contributions to the richness and diversity of society, and that States which take appropriate measures to recognize and promote minority rights are more likely to remain tolerant and stable.

The concepts of “minority” and “majority” are relatively recent in international law, although distinctions among communities have obviously existed throughout history. Some political systems did grant special community rights to their minorities, although this was not generally based on any recognition of minority “rights” per se.⁷ The Ottoman Empire, for example, allowed a degree of cultural and religious autonomy to non-Muslim religious communities, such as Orthodox Christians, Armenians, Jews and others under millet system. It was an independent court of law pertaining to “personal law” under which a confessional

⁷ Jennifer Jackson Preece, *National Minorities and the European Nation-states System* (1998).

community (a group abiding by the laws of Muslim Sharia, Christian Canon law, or Jewish Halakha) was allowed to rule itself under its own laws.⁸ The French and American revolutions in the late eighteenth century proclaimed the free exercise of religion as a fundamental right, although neither directly addressed the broader issue of minority protection. In the United States, freedom of religion is a constitutionally protected right provided in the religion clauses of the First Amendment. Freedom of religion is also closely associated with separation of church and state, a concept advocated by Colonial founders such as Dr. John Clarke, Roger Williams, William Penn and later Founding Fathers such as James Madison and Thomas Jefferson.⁹ The 1815 Congress of Vienna, which dismantled the Napoleonic Empire, recognized minority rights to some extent, as did the 1878 Treaty of Berlin, which

⁸ Bruce Masters, *CHRISTIANS AND JEWS IN THE OTTOMAN ARAB WORLD: THE ROOTS OF SECTARIANISM* (2001), at 61.

⁹ Mark Zimmerman, *Symbol of Enduring Freedom*, COLUMBIA MAGAZINE 19 (2010).

recognized special rights for the religious community of Mount Athos.¹⁰

The issue of the rights and duties of minorities in Islam is one of crucial importance and value for all Muslims, if only to make sure that no one attributes to them anything in this regard that is unworthy of the authentic texts and the established principles. This also has been a matter of concern for diverse international circles. Beyond all, it has pertinence for those to whom the actual status of “minority” currently applies.

All countries around the world include persons belonging to national or ethnic, religious and linguistic minorities, which enriches the diversity of their societies.¹¹ Despite the diverse conditions of minorities, what is common among minorities, in many cases, is that they face multiple forms of discrimination resulting in marginalization and exclusion. To achieve an effective participation of

¹⁰ Dr. Andrea Benzo & Professor Silvio Ferrari (Editors) BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE: LEGAL AND RELIGIOUS (2014).

¹¹ UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), ICCPR

minorities and to end exclusion, there should be an acceptance of diversity through the promotion and implementation of international human rights standards.

When the Prophet migrated from Mecca to Medina owing to persecution in Mecca at the hands of Meccan tribal leaders, he found Medina's society a pluralistic society. There were Jews, pagans and Muslims and also Jews and pagans were divided into several tribes, each tribe having its own customs and traditions. The Prophet drew up a covenant with these tribes guaranteeing them full freedom of their faith and also creating a common community in the city of Medina with an obligation to defend it, if attacked from outside.¹²

The issue of minority rights today is at the core of the notion of civic rights, and the objective in this paper, is to demonstrate, as we possibly can, that Islam did institutionalize the civic rights for minorities, and that there is no room in Islam for anyone to question these rights (of minorities) or to

¹² A. A. Maududi, HUMAN RIGHTS IN ISLAM (1997) 236.

use religion to obstruct any of these rights, inasmuch as civic rights (in Islam) are governed by the laws of the land, applicable to all, without discrimination.

II. HISTORICAL DEVELOPMENT OF INTERNATIONAL PROTECTION OF MINORITIES

Though the oldest roots of minority protection can be traced to the seventeenth century reforms regarding protection of religious minorities, but explicitly can be traced from Westphalia Treaty (1648).¹³ Even the treaty of Oliva in 1660 in favor of the Roman Catholics in Livonia, ceded by Sweden and Poland also tried to protect minorities. The millet system of the Ottoman Empire, for example, allowed a degree of cultural and religious autonomy to non-Muslim religious communities, such as Orthodox Christians, Armenians, Jews and others.¹⁴ The Ottoman Empire followed the tradition of the millet system, and, beginning with Sultan Mehmet Fatih

¹³ Compare for example Treaty of Westphalia, which in 1648 granted religious right to the Protestant German population.

¹⁴ Nazila Ghanea, *Are Religious Minorities Really Minorities?*, 1 OXFORD J. L. & RELIGION 57 (2012).

(the Conqueror),¹⁵ improved its institutional structure by explicitly stating that rights of non-Muslim communities be addressed to them in the royal decrees. These decrees were called Ahdname, and because they were accompanied by the Sultan's pledge, they had the force of an international contract.¹⁶

Greek Orthodox Christians were not established as the first millet after the conquest of Constantinople by Sultan Mehmet (1453), as is commonly assumed in the literature. Rather, they had the same communal rights all along under the Seljuqs and the Ottomans prior to the conquest of Constantinople in 1453.¹⁷ The Orthodox patriarch had been granted the same rights as the leaders of other communities that had previously come under Islamic rule. The patriarch was allowed to apply Orthodox law in secular and

¹⁵ S. J. Shaw, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* (1977).

¹⁶ K. El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 *ISLAMIC L. & SOC.* 141 (1994).

¹⁷ Halil İnalcık & Donald Quataert (Editors), *AN ECONOMIC AND SOCIAL HISTORY OF THE OTTOMAN EMPIRE: 1600-1914* (1997).

religious matters.¹⁸ What Sultan Mehmet, who after the fall of Constantinople considered himself the Eastern Roman Emperor, did was to grant a charter to the patriarch of the Orthodox Church, Genady II. As the policy of religious pluralism and multiculturalism was consolidated by the millet system, it allowed the Jews to form their own community and to establish independent religious, educational, and legal institutions in Istanbul.¹⁹ Historians commonly note that the freedom that was granted to the minorities within the Ottoman territories attracted large numbers of displaced Jewish communities that were among the victims of persecution in Spain, Poland, Austria, and Bohemia.²⁰ While in Russia, Rumania, and most of the Balkan states, Jewish communities suffered from constant persecution (pogroms, anti-Jewish laws, and other vexations), Jews established on Turkish

¹⁸ Recep Senturk, *Towards an Open Science: Learning from the Ottoman Humanities*; NEW MILLENNIUM PERSPECTIVES ON THE HUMANITIES, Judi Upton-Ward (Editor), 55 (2002).

¹⁹S. J. Shaw, *JEWS OF THE OTTOMAN EMPIRE AND THE TURKISH REPUBLIC* (1991).

²⁰ Braude & Lewis, *CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY* (2013).

territory enjoyed an altogether remarkable atmosphere of tolerance and justice.²¹

The French and American revolutions in the late eighteenth century proclaimed the free exercise of religion as a fundamental right, although neither directly addressed the broader issue of minority protection. On the contrary “the contemporary minority issues with which we have familiarity are largely rooted in the nineteenth century.”²² The three great congresses of the nineteenth century, Vienna (1814-15), Paris (1856), and Berlin (1878), included minority protection provisions in treaties establishing rights and security of populations that were to be transferred to a foreign sovereignty.²³ However, more rational approach can be seen for the first time in the history of international law that steps

²¹ P. Dumont, *Jewish Communities in Turkey during the Last Decades of the Nineteenth Century in the Light of the Archives of the Alliance Israelite Universelle*, CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE 209 (2013).

²² Jay A. Sigler, MINORITY RIGHTS. A COMPARATIVE ANALYSIS 68 (1983).

²³ Patrick Thornbery, ‘*Historical Background: International Law Moves from Protection of Particular Groups to Norms of a Universal Character*’, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 37 (1991).

were taken for minority protection and their rights were methodically defined in the Treaty of Versailles, after the World War I.²⁴

The international protection of minorities originates from the Paris Peace Conference, was held in 1919, giving the birth of League of Nations.²⁵ Although the pact of the League of Nations contained no provisions regarding human rights, it incorporated two relating systems of mandates and of minorities.²⁶ The League's failure to establish an effective minorities system reflected the economic, social, and political problems of the inter-war period and contributed to the fall of Woodrow Wilson's vision²⁷ of 1919 of security system and disarmament, that resulted with the Second World War. The idea of human rights protection emerged stronger after

²⁴ Carole Fink, *The League of Nations and the Minority Question*, 157 WORLD AFFAIRS 197 (1995).

²⁵ Margaret MacMillan, *PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD* (2003).

²⁶ Thomas Buergenthal, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (2009).

²⁷ Thomas J. Knock, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* (1995).

Second World War's disaster²⁸ for peoples that would be considered minorities from today's perspective. At that time, those peoples did not enjoy any rights.²⁹

Most international legal-political concerns during the nineteenth century, however, were directed towards justifying the unification of linguistic "nations" based on the principle of self-determination, rather than the protection of minority groups as such.³⁰ As the lure of nationalism grew, people who did not share the ethnic, linguistic or religious identity of the majority within their country were increasingly under threat.³¹ The consolidation of States along linguistic lines, expansion of trade and increasing need for literate populations who could work successfully in the context of the industrial revolution placed pressures on smaller or less powerful communities to conform to dominant

²⁸ John S. Gibson, *DICTIONARY OF INTERNATIONAL HUMAN RIGHTS LAW* (1996).

²⁹ Louis Henkin, *THE AGE OF RIGHTS* (1990).

³⁰ Jörg Fisch, *A HISTORY OF THE SELF-DETERMINATION OF PEOPLES: THE DOMESTICATION OF AN ILLUSION* (2015), at 118.

³¹ Timothy Baycroft, *NATIONALISM IN EUROPE 1789–1945* (1998), at 104.

linguistic and cultural norms. By the time of the outbreak of the First World War in 1914, national or minority concerns were at the forefront of international politics, at least in Europe.³²

Today “minorityism” is a global phenomenon, though its time significance and concomitant elements differ from country to country, the issue has been under the constant consideration of the United Nations. It explains why many conventions have been passed and declarations made for the “Prevention of Discrimination and Protection of Minorities.” At the United Nations level the term “minority” has been defined as a "group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."³³

³² *Ibid.*

³³ Gaetano Pentassuglia, *MINORITIES IN INTERNATIONAL LAW* (2002).

III. DEFINING THE TERM “MINORITIES”

The United Nations Minorities Declaration in its Article 1³⁴ and Article 2³⁵ refer to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence, adopted by consensus in 1992.³⁶ There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority).

Despite many references to “minorities” in international legal instruments, there is no

³⁴ Article 1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

³⁵ Article 2, States shall adopt appropriate legislative and other measures to achieve those ends.

³⁶ United Nations Human Rights, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992.

universally agreed, legally binding definition of the term “minority.”³⁷ This is primarily because of a feeling that the concept of “minority” is inherently vague and imprecise and that no proposed definition would ever be able to provide for the innumerable minority groups that could possibly exist.³⁸ Moreover, there are many states that prefer the definition to be too restrictive so that large trenches of their population do not fall within the definition. The diverse contexts of different groups claiming minority status also makes it difficult to formulate a solution of universal application.³⁹ Consequently, international law has found it difficult to provide any firm guidelines in relation to defining the concept.⁴⁰ Both states and the potential minorities themselves obstruct the process of defining the

³⁷ Francesco Capotorti, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* (1991), at 5.

³⁸ Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights* (2000), at 14.

³⁹ Philip Vuciri Ramaga, “*Relativity of the Minority Concept*,” 14 *Human Rights Q.* 112 (1992).

⁴⁰ Javaid Rehman, *supra* at 14-15.

scope of the term.⁴¹ Nevertheless, the efforts made so far at various forums and by various international lawyers offer good insights as to the factors to be taken into consideration in developing a definition of the term “minority.”⁴²

The most widely acknowledged definition is the one formulated by Capotorti,⁴³ a special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1977. According to him a minority is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their

⁴¹ Rhona K. M. Smith, “*The Fate of Minorities – Sixty Years On*,” 1 WEB J. CURRENT LEGAL ISSUES (2009).

⁴² Philip Vuciri Ramaga, “*Relativity of the Minority Concept*,” 14 Human Rights Q. 104 (1991).

⁴³ Jelena Pejic, “*Minority Rights in International Law*,” 19 Human Rights Q. 671 (1997).

culture, traditions, religion or language.⁴⁴

For the purpose of his study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, he defined, with the application of Article 27 of ICCPR in mind, a minority group as a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the state possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁴⁵

In 1985, the Sub-Commission submitted to the Commission on Human Rights a text on the definition of “minority” prepared by Jules Deschenes. The definition was, however, not

⁴⁴ E/CN.4/Sub.2/384/Rev.1, para. 568.

⁴⁵ Francesco Capotorti, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES (1991), at 98.

accepted by the Commission. According to this definition, minority is a group of citizens of a state, consisting of a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious, or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if not implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.⁴⁶

Although there is some measure of agreement regarding essential elements of the definitions proposed by Capitorti and Deschenes, some of the elements are criticized for being vague, misleading and inadequate for the diversified minority situations. Some countries considered the definitions as irrelevant, while others saw it as non-

⁴⁶ Jules Deschenes, "Proposal concerning a definition of the term minority," UN Doc. E/CN.4/Sub.2/1985/31/Corr.1 para.181 (1985).

contributive to the debate concerning the definition of the term “minority.”⁴⁷

The Charter of the United Nations makes no mention of minority rights per se, but it does include several provisions on human rights, including Article 1 (3), which identifies as one of the purposes of the United Nations the achievement of international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” In 1948, the General Assembly adopted the Universal Declaration of Human Rights, which articulated the content of human rights in much greater detail and remains one of the most important international human rights documents: its anti-discrimination provisions and other articles are of central importance also for persons belonging to minorities. While the General Assembly was unable to agree on any formulation in the Declaration concerning minority rights per se, it did note that the

⁴⁷ Steven Wheatley, *DEMOCRACY, MINORITIES AND INTERNATIONAL LAW* (2005) 20.

United Nations “cannot remain indifferent to the fate of minorities.” It added, in the same resolution that proclaimed the Universal Declaration, that it was “difficult to adopt a uniform solution for this complex and delicate question [of minorities], which has special aspects in each State in which it arises.”⁴⁸

Adopted by consensus in 1992, the United Nations Minorities Declaration in its article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence. There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority). The 1992 declaration seeks to protect—cultural, religious, and linguistic affiliations,

⁴⁸ Resolution 217 C(III).

political participation, and freedom of association— are the same as those underlying Article 27. Universal in significance, they are constituent features of human identity shared by members of majorities and minorities alike.⁴⁹

The difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live. Some live together in well-defined areas, separated from the dominant part of the population.⁵⁰ Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history; others retain only a fragmented notion of their common heritage.

The term minority as used in the United Nations human rights system usually refers to national or ethnic, religious and linguistic minorities, pursuant to the United Nations Minorities Declaration. All

⁴⁹ Other UN instruments that extend minority rights protection include the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277; UNESCO Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 43. *See also*, The Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (Jul. 12, 1993).

⁵⁰ From the Editors: *Minority as a Global Concept and Political Problem.* Ab Imperio 2019, 4, 9 (2019).

States have one or more minority groups within their national territories, characterized by their own national, ethnic, linguistic or religious identity, which differs from that of the majority population.⁵¹

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is: A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁵²

While the nationality criterion included in the above definition has often been challenged, the requirement to be in a non-dominant position remains important. In most instances a minority

⁵¹ I.A. Laponce, *THE PROTECTION OF MINORITIES*(1960), at 44.

⁵² E/CN.4/Sub.2/384/Rev.1, para. 568.

group will be a numerical minority, but in others a numerical majority may also find itself in a minority-like or non-dominant position, such as Blacks under the apartheid regime in South Africa. In some situations, a group which constitutes a majority in a State as a whole may be in a non-dominant position within a particular region of the State in question.

In addition, it has been argued that the use of subjective criteria, such as the will on the part of the members of the groups in question to preserve their own characteristics and the wish of the individuals concerned to be considered part of that group, combined with certain specific objective requirements, such as those listed in the Capotorti definition, should be taken into account. It is now commonly accepted that recognition of minority status is not solely for the State to decide, but should be based on both objective and subjective criteria.

The question often arises as to whether, for example, persons with disabilities, persons belonging to certain political groups or persons with a particular sexual orientation or identity (lesbian,

gay, bisexual, transgender or intersexual persons) constitute minorities. While the United Nations Minorities Declaration is devoted to national, ethnic, religious and linguistic minorities, it is also important to combat multiple discrimination and to address situations where a person belonging to a national or ethnic, religious and linguistic minority is also discriminated against on other grounds such as gender, disability or sexual orientation. Similarly, it is important to keep in mind that, in many countries, minorities are often found to be among the most marginalized groups in society and severely affected by, for example, pandemic diseases, such as HIV/AIDS, and in general have limited access to health services.⁵³

IV. MINORITIES RIGHTS UNDER INTERNATIONAL LAW

The first significant attempt to identify internationally recognized minority rights was

⁵³ Minority Rights: International Standards and Guidance for Implementation (HR/PUB/10/3).

through a number of “minority treaties” adopted under the auspices of the League of Nations. With the creation of the United Nations (1945), attention initially shifted to universal human rights and decolonization. However, the United Nations has gradually developed a number of norms, procedures and mechanisms concerned with minority issues.

Today, issues related to the rights of persons belonging to minorities may be found in nearly every human rights instrument. The United Nations recognize that minority rights are essential to protect those who wish to preserve and develop values and practices which they share with other members of their community and had been champion for the cause of minorities rights since its inception, 1945. United Nations provides protection of the rights of minorities under Article 27 of the International Covenant on Civil and Political Rights (ICCPR),⁵⁴ and under Article 30 of the Convention of the Child. In addition, the United Nations Declaration on the

⁵⁴ UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, (1994).

Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is the document which sets principle standards and provide guidance to countries to take legislative and other necessary measures to ensure the rights of persons belonging to minorities.⁵⁵ Instruments adopted by the Conference on Security and Co-operation in Europe and the Council of Europe, on the other hand, refer only to “national” minorities. The Minorities Declaration has the broadest scope, encompassing persons belonging to “national or ethnic, religious and linguistic minorities;” it also refers to the protection of “cultural” identity.⁵⁶

The UN Declaration on Minorities, as the first exclusively devoted to the subject, is perhaps the single most important UN instrument on minority rights; but it is neither the beginning nor the end of UN efforts to promote and protect minority rights. Such as the Convention against Genocide; the

⁵⁵ K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-determination* (2000) 48.

⁵⁶ Ernest Gellner, *NATIONS AND NATIONALISM* (1983).

International Convention on the Elimination of All Forms of Racial Discrimination; UNESCO's Convention Against Discrimination in Education; the Convention on the Rights of the Child; the UNESCO Declaration on Race and Racial Prejudice; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief; the Universal Declaration of Human Rights (Article 26); the International Convention on Economic, Social and Cultural Rights (Article 13); and the Declarations and Programmes of Action adopted in 1978 and 1983 by the two World Conferences to Combat Racism and Racial Discrimination.⁵⁷

Article 13 the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the right of everyone to education, stating in some of its paragraphs that states should made possible for parents or legal guardians to choose for their children schools, other than those established

⁵⁷ Carole Fink, *The League of Nations and the Minority Question*, 157 WORLD AFFAIRS (1995).

by the public authorities, which conform to such minimum educational standards. States are also expected to ensure the religious and moral education of their children in conformity with their own convictions. The Limburg principles on the implementation of ICESCR⁵⁸ endeavor to eliminate all kind of discrimination and adopt special measures that allow disadvantaged groups access to the enjoyment of the economic, social and cultural rights.⁵⁹

The first Optional Protocol to the ICCPR⁶⁰ allows individuals to submit complaints to the Human Rights Committee. The Human Rights Committee, an expert body, was established to monitor the implementation of the ICCPR and the Protocols to the Covenant in the territory of States parties. One part of its activities is the assessment of the reports,⁶¹ which States parties must submit every

⁵⁸ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.

⁵⁹ Asbjorn Eide, Katarina Krause, & Allan Rosas (Editors), *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (1995).

⁶⁰ Adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976. 0

⁶¹ Article 40 of the Covenant on Civil and Political Rights.

five years on the legislative and implementation measures they have adopted regarding the rights recognized in the Covenant and on the progress made in the enjoyment of those rights. The other scope of Human Rights Committee competences is individual procedure mechanism, designed for individuals who claim that their rights and freedoms have been violated by the State who is the party to the Optional protocol.⁶² The International Convention on the Elimination of All Forms of Racial Discrimination has protective closes extending to minorities.⁶³ Under the scope of the Article 14 the Committee on the Elimination of Racial Discrimination (CERD),⁶⁴ that was the first body by the United Nations created to monitor and review States' actions taken in fulfillment of their obligations under a specific

⁶² Great part of the minority rights related cases decided by the Human Rights Committee are related to rights of indigenous peoples. *See, Lubicon Lake Band (Bernard Ominayak) v. Canada* (No 167/1984) (CCPR/C/38/D/167/1984), *Lovelace v. Canada* (No.24/1977), *Mikmaq v. Canada* (No.78/1980), 2 Selected Decisions 23, *Kitok v. Sweden* (No. 197/1985), 1988 Report of the Human Rights Committee, GAOR 43rd Session, *Cadoret v. France* (Nos 221/1987 and 323/1988). *Ibid* at 219.

⁶³ *Ibid* at 219.

⁶⁴ Adopted and opened for signature and ratification on 21 December 1965, entry into force 4 January 1969.

human rights agreement.⁶⁵ The Convention establishes three procedures to make it possible for CERD to review the legal, judicial, administrative and other steps taken by individual States to fulfill their obligations to combat racial discrimination. Firstly, all States which ratify or accede to the Convention must submit periodic reports to CERD. Secondly, the Convention provides for State-to-State complaints. Thirdly, the Convention makes possible for an individual or a group of persons who claim to be victims of racial discrimination to lodge a complaint with CERD against their State.

The Convention on the Prevention and Punishment of the Crime of Genocide⁶⁶ also extends its protection to minority groups, defining the genocide in the Article 2 as an act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing

⁶⁵ Human Rights Committee (which has responsibilities under the International Covenant on Civil and Political Rights), the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child.

⁶⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force on January 12, 1951.

members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

The 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is generally seen as the consequence of events occurred after the fall of communism. It is the fundamental instrument that guides the activities of the United Nations in this field today. The Declaration contains a list of rights in favor of persons belonging to ethnic, national, religious or linguistic minority, and obligates State parties “to protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that

identity.”⁶⁷ The weak point of Declaration is lack of precise states’ obligations. However, it is not a legally binding document, but simply a political declaration, it represents one of the first international documents that attempted to promote protection of minority rights.⁶⁸

Special measures for minorities, even for limited duration, remain a controversial issue and are often misunderstood as an exception to the “equal opportunities” and tilting the “level playing fields” concepts.⁶⁹ Well-informed commentators have pointed out that where group rights of the majority are provided for by the state, the equivalent (not identical) group rights should also be provided for minorities. “Minorities are members of a state; they contribute to its finances and should benefit from provisions for their language, religion, association and culture. This concept can be explored through

⁶⁷ Article 1 of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

⁶⁸ Florence Benoit-Rohmer, *THE MINORITY QUESTION IN EUROPE* (1996).

⁶⁹ Asbjorn Eide, Katarina Krause, & Allan Rosas (Editors), *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (1995).

“pluralism in togetherness” or “pluralism by territorial sub-division”⁷⁰ as explained by Asbjorn Eide.⁷¹

V. MINORITIES (DHIMMAH/ DHIMMI⁷²) IN ISLAM

There is no such difference between Muslims and non-Muslims as far as human rights are concerned. The same is true between citizens of an Islamic state and others because human rights are not granted on the basis of citizenship. These basic rights include the right to life, property, freedom of religion, freedom of expression, family, and honor. These rights are granted to all human beings by virtue of their being human.

The fact that non-Muslim minorities are conventionally called dhimmis is a historical⁷³ term

⁷⁰ *Ibid.* Asbjorn Eide.

⁷¹ Chairman of UN Working Group on the Rights of Minorities and Norwegian human rights scholar with base in Law and Social Science Research.

⁷² Plural of “dhimma.”

⁷³ Juan Eduardo Campo (Editor), "dhimmi," *ENCYCLOPEDIA OF ISLAM* (2010), at 195. Dhimmis are non-Muslims who live within Islamdom and have a regulated and protected status ,and allowed to retain his or her original faith.

referring to non-Muslims living in an Islamic state with legal protection, it means nothing other than reiterating and affirming with a written contract that non-Muslims are equal with Muslims in enjoying the right to personhood. It indicates that non-Muslim minorities also have the right to legal personhood and that they acknowledge their accountability. It may be seen as a declaration of the equality in that aspect between Muslims and non-Muslims. Other non-Muslims, without a treaty with Muslim authority, have to officially acknowledge and register that they accept their accountability and liability before the law for their actions.⁷⁴

Dhimmah is based on verse 9:29 of the Quran and finds precedent in the conquest of Mecca. Caliph Umar's pact with non-Muslims, granting them life and property protection, constitutes the detailed provisions of the institution/state. It is the state's obligation under sharia to protect the minorities life, property, and freedom of religion. in exchange they

⁷⁴ H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD* (2007), at 219.

have to pay the jizya tax, which complemented the zakat, or obligatory alms, paid by the Muslim subjects.⁷⁵ Under this status, minorities enjoyed exemption from military service, freedom of religion, freedom to practice their religious duties, and the right to renovate, although not to erect, new houses of worship.⁷⁶

The following citation from the prominent Hanafi jurist Sarakhsi (d. 1090) succinctly elucidates the issue of personhood:

Upon creating human beings, God graciously bestowed upon them intelligence and the capability to carry responsibilities and rights (dhimmah personhood). This was to make them ready for duties and rights determined by God. Then He granted them the right to inviolability, freedom, and property to let them continue their lives so that they can perform the duties also. Then these rights to carry responsibility/ duties and enjoy rights, freedom, and property exist with a human being when he is born. The insane / child and the sane / adult are the same concerning these rights. This is how the

⁷⁵ W. Hallaq SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS (2009).

⁷⁶ H. Patrick Glenn, *supra* 219-21.

proper personhood is given to him when he is born for God to charge him with the rights and duties when he is born. In this regard, the insane/child and sane/adult are equal.⁷⁷

According to Senturk, “non-Muslims are already granted all the rights they may possibly have by virtue of their humanity, and thus signing a treaty with Muslims is not going to bring them new rights. However, the act of dhimmah serves as a confirmation of those rights and duties by both parties.”⁷⁸ According to Senturk, “Dhimmah” is also commonly understood as ‘protection,’ ‘treaty’ (‘ahd), and ‘peace’ (sulh, rather truce), because it is a treaty that puts non-Muslims under the protection of Muslims. Thus, ‘This is in his dhimmah’ means that a person is accountable to the law or is under its protection. This accountability may be based on a written contract or a general law.⁷⁹

⁷⁷ S. Abul Ala Maududi, *ISLAMIC LAW AND CONSTITUTION* (1997) 296.

⁷⁸ Recep Senturk, Adamiyyah, & Is-mah, *The Contested Relationship between Humanity and Human Rights in Classical Islamic Law*, *Turkish J. Islamic Stu.*, no 8 (2002).

⁷⁹ *Ibid* Recep Senturk (2002).

Islamic jurisprudence stipulates that dhimmah is what makes a person responsible for the consequences of his actions; because he has personhood, others can hold him liable for his deeds and demand that he fulfill his duties - which are their rights. Yet it is unanimously accepted that 'one's dhimmah is originally clear of charges' (al-Asl fi al-dhimmah al-bara'ah) unless a charge is proven beyond doubt by evidence. This principle is interpreted as 'one is innocent unless proven otherwise.'⁸⁰

VI. DIVERGENT VIEWS REGARDING DHIMMAH

The more conservative Islamic thinkers reject any thought of changing the institution of *dhimmah*.⁸¹ Their views range from denying the principle of equality to religions other than Islam,

⁸⁰ Wael B. Hallaq, *A history of Islamic Legal Theories: An Introduction To Sunni Usul Al-Fiqh* (1997)

⁸¹ Mashood A. Baderin, Recep Sentur *Sociology of Rights: "I Am Therefore I Have Rights": Human Rights in Islam between Universalistic and Communalistic Perspectives Muslim World*, 2 J. HUMAN RIGHTS (2004). See also, Omar Bakri, *ESSENTIAL FIQH* (1996).

through blocking certain positions of influence in the state to non-Muslims, to reiterating their rights and Islam's traditional liberal attitude according to the *sunna*, especially by comparison to European historical record. Some even go as far as to offer "Islamic citizenship" to non-Muslims.⁸²

Others claim that the distinction between Muslim and non-Muslim is one of political administration, not of human rights, according *dhimma* to all religionists (Quran 17:70, 2:62, 5:69, 22:17, 5:48). The debate over *dhimma* includes political issues: Some of the minorities are accused of having abused it internally, and the West has been accused of having created and exacerbated the entire problem of "minorities."

Not all Islamic jurists in the classical period agreed with these views. The competing communalist discourse, represented by Muhammad ibn Idris al-Shafii (d. 820), Malik Ibn Anas (d. 795), and Ahmad ibn Hanbal (d. 855), maintains that having *dhimma* (personhood) is a status that only

⁸² Intisar A. Rabb, 'REASONABLE DOUBT' IN ISLAMIC LAW (2014).

Muslims can enjoy. Non-Muslims achieve that status by virtue of the contract they make with the Muslim authority or Ruler.⁸³

From this perspective, *dhimmah* is a gained right and privilege; it is also the basis of other rights to be gained by virtue of signing a treaty with the Muslim authority. Enjoying legal personhood requires fulfilling the conditions of the treaty. Otherwise, it will be lost. One of the conditions of keeping legal personhood is to pay the special poll-tax, *jizya*, to the state.⁸⁴ Jurists adopt divergent views on why minorities should be granted rights. Is it because of their humanity, or because of their citizenship?

There are contradicting and evolving views advocated by jurists from the classical and modern periods. The cleavage between universalist and communalist jurists can be observed in all major legal traditions, including Islamic law. The universalist group believes that human beings, be they from the majority or the minority, are entitled to

⁸³ Wael Hallaq, *supra* at 80.

⁸⁴ Rauf I.F.A., *Shariah and the Objectives of Islamic Law*, DEFINING ISLAMIC STATEHOOD (2015).

rights by virtue of their humanity. In contrast, the communalist group is concerned only with the rights of the citizens of their state, usually called a nation, or with the members of religious or ethnic communities.

VII. THE MINORITY RIGHTS IN ISLAM

In Islam, the first document that protects the rights of minorities is known as “the Madinah Constitution” or “the Madinah Pact,” which we will talk about it later in this paper. But before that, it should be pointed out that the Arabian Peninsula has known, before the emergence of Islam, a charter related to human rights, which is called “Hilf al-Fudul,”⁸⁵ which translates as “the league of the virtuous,” this charter which dates back to the year 590 AD, was approved and praised by the Prophet

⁸⁵ This was a seventh century alliance created by the prophet Muhammad and various Meccans, to establish justice for all through collective action, even for those who had no powerful connection. Because of Prophet’s role in its formation, the alliance plays a significant role in Islamic ethics.

Muhammad, peace be upon him.⁸⁶ It was narrated that the Prophet Mohamed peace be upon him said: “I was with my cousins in Abdullah bin Juda’s home when this oath was affirmed. That oath is more pleasant to me than owning red- haired camels. And if I am summoned to it during the Islamic era, I will accept it.” Also,⁸⁷ “the Pact of Umar” which was held by the second Caliph Omar Ibn Khattab may Allah be pleased with him with the people of Elae in Jerusalem (Eastern Jerusalem), in which he granted them security for their churches and properties when Muslims opened the city in 638 AD.⁸⁸ The Siege of Jerusalem was part of a military conflict which took place in the year 636-637/38 AD between the Byzantine Empire and the Rashidun Caliphate. It began when the Calipha’s army, under the command of Abu Ubaidah, besieged Jerusalem beginning in

⁸⁶ Muhammad Hamidullah, *THE FIRST WRITTEN CONSTITUTION IN THE WORLD: AN IMPORTANT DOCUMENT OF THE TIME OF THE HOLY PROPHET* (1975).

⁸⁷ Wael B. Hallaq, *SHARI’A: THEORY, PRACTICE, TRANSFORMATIONS* (2009).

⁸⁸ Bernard Lewis, *THE ARABS IN HISTORY* (2002). Also see Amikam Elad, *MEDIEVAL JERUSALEM AND ISLAMIC WORSHIP: HOLY PLACES, CEREMONIES, PILGRIMAGE* (1999).

November 636 AD. After six months, the Patriarch Sophronius agreed to surrender, on condition that he submit only to the Caliph. In 637 AD or 638 AD, Caliph Umar traveled to Jerusalem in person to receive the submission of the city.⁸⁹

Indeed, we can always link rights to duties, because ‘right’ and ‘duty’ always go hand in hand and are interdependent. The right is all what is granted to the individual or the community or the two together, decided by law/Sharia in order to achieve an interest or to prevent a harm, while the duty is all what men are responsible for in this context.⁹⁰ Definitely, it is needed to present elements that may serve as a reference for the international drive towards evolving a fundamental document relevant to the issue of the rights of minorities, as a common framework that may be referred to, especially by those who are not so clear about the issue, a

⁸⁹ David Nicolle, *Yarmuk 636 A.D.: The Muslim Conquest of Syria* (1994). Also see, Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, Vol. 6 (1862).

⁹⁰ K. El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 Islamic L. & Soc. 145 (1994).

document that would benefit Muslims, minority-members, institutions, and such other concerned parties.⁹¹ A minority is a social community representing a minor group within a particular demographic setting. A minority's status usually transcribes into a curtailment of rights, whether those that are meant to be shared equally with the majority or those that are specific to that minority. A minority status may refer, as we all know, to a racial, ethnic, religious or cultural affiliation.⁹² Our focus here is on the religious minority mostly.

VIII. AL MADINAH PACT

The Madinah Pact is considered as the first civil constitution evolved under Islam as established by the Prophet (PBUH) in the first year of the Hejira (Emigration to Madinah)/623⁹³ AC, we find the

⁹¹ Fernando R. Teson, *International Human Rights and Cultural Relativism*, in *The Philosophy of Human Rights: Readings in Context Paragon Issues in Philosophy* Patrick Hayden (Editor) 379 (2001).

⁹² *Ibid.* Fernando R. Teson.

⁹³ Yetkin Yildirim, *The Medina Charter: A Historical Case of Conflict Resolution, Islam and Christian-Muslim Relations*, 20 ISLAM & CHRISTIAN-MUSLIM RELATIONS 450 (2009).

reference to the people of “Dhimmah,”⁹⁴ a term frequently used in pre-Islamic times to refer to neighbors and to the notion of neighborhood which involved a principal of mutual guardianship observed among Arab tribes in times of peace and war. The Prophet (PBUH) refashioned this pre-Islamic tribal paradigm into a religious duty by labeling it as “Allah’s ordained Guardianship.”⁹⁵ In fact, under item fifteen of the said Madinah Pact, “Allah’s ordained Guardianship” is a right shared among all Muslims who are thus duty-bound to offer exclusive support (guardianship) to each other.⁹⁶

A pact, or covenant in such a context is also known as “Dhimmah,” that is a contract of safe-conduct and guardianship. Suffice it that Islam has had the credit of introducing this notion, thus

⁹⁴ K. A. Armstrong, HISTORY OF GOD: THE 4000 YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM (1993). “As the armies of conquest encountered communities of Jews, Christians, and Zoroastrians, the model of Prophet Muhammad’s accommodating behavior extended the original notion to incorporate all these recipients of God’s revelation as Ahl al-Dhimmah, or Dhimmi, protected peoples.” A. A. Knopf.

⁹⁵ Wael B. Hallaq (2009), *supra* at 87.

⁹⁶ Mohamed Berween, *Al-Wathiqah: The First Islamic State Constitution*, 23 J. MUSLIM M. AFFAIRS 117 (2003).

institutionalizing the Islamic State's relation with the minorities, as a relation of protection and ensured safety on a basis of mutual responsibility, whereby whoever is granted "safety" is granted protection for his life, his religion, his livelihood and his culture.⁹⁷ And, in no way does this bear any notion of disdain or ascendancy over the other as alleged by scores of ill-intentioned Western studies that took up the subject of Dhimmah and People of Dhimmah (protected people, under Allah's witness). Indeed, the term has been used by Muslim scholars to mean a "covenant," and by some orthodoxy as indicating a "mandatory" nature.⁹⁸

A covenant-partner is someone who may have been at war with Muslims and then those to conclude peace with them reaching an agreement with them on the grounds of mutually accepted terms to be observed by both parties.⁹⁹ It is a common

⁹⁷ Saïd Amir Arjomand, *The Constitution of Medina: A Socio-legal Interpretation of Muhammad's Acts of Foundation of the "Umma,"* 41 INT'L J. M. EAST STUD. 555 (2009).

⁹⁸ Wael Hallaq, *A History Of Islamic Legal Theories* (1997).

⁹⁹ Muhittin Ataman, *Islamic Perspective on Ethnicity and Nationalism: Diversity or Uniformity?* 23 J. MUSLIM M. AFFAIRS 89 (2003).

knowledge that honoring an agreement is an obligation under Islamic Shariah. Allah Almighty says “Honor your pledge – Indeed you are answerable for your pledge”(Quran AYAH al-Isra` 17:34). “Come not near the wealth of the orphan save with that which is better till he come to strength; and keep the covenant. Lo! of the covenant it will be asked.” (Quran AYAH al-Isra` 17:34)¹⁰⁰

In the pact that was signed by the Prophet (PBUH) with the Christians of Najran,¹⁰¹ we find the terms “Dhimma” and “Jiwar” (Ensured safety and protection) carrying the meaning of a protection that goes hand in hand with the freedom enunciated in the agreement.¹⁰²

¹⁰⁰ Pickthal Translation . *Quran AYAH al-Isra` 17:34* (Translation- Come not near the wealth of the orphan save with that which is better till he come to strength; and keep the covenant. Lo! of the covenant it will be asked.)

¹⁰¹ Sir Muhammad Zafrulla Muhammad Khan, SEAL OF THE PROPHETS (1980). In the tenth year of the Hijrah, a delegation of fourteen Christian Chiefs from Najran; among them Abdul Masih of Bani Kinda, their chief, and Abdul Harith, bishop of Bani Harith, came to Medina to make a treaty with the prophet Muhammad, and were permitted by him to pray in his mosque, which they did turning towards the east.

¹⁰² Yetkin Yildirim, *The Medina Charter: A Historical Case of Conflict Resolution*, 20 ISLAM & CHRISTIAN–MUSLIM RELATIONS 440 (2009).

As for the Al-Quds Covenant which was concluded by Caliph Omar with the people of Al-Quds after its conquest, it uses the term “Allah’s covenant” instead of talking about protection rights and “Guaranteed freewill,”¹⁰³ indicating that these two words are synonymous, bearing the same meaning.¹⁰⁴ Many earlier scholars have indeed explored the foundations of the Islamic approach in dealing with minorities, reasoning by deduction, on the basis of the Holy Book and the Sunnah (Prophet’s Tradition), to fathom the matter and the prescribed duties of either party.¹⁰⁵ At this regard, these scholars emphasized that Islam is founded on three general principles in the light of which one can appreciate the great mass of rights introduced by this religion, including the very aspects of concern to us here:

First: Removing all the considerations that underlie the different types of segregation such as

¹⁰³ Syed Ameer Ali, *A CRITICAL EXAMINATION OF THE LIFE AND TEACHINGS OF MOHAMMED* (1873).

¹⁰⁴ W. Hallaq, *Considerations on the Function and Character of Sunni Legal Theory*, 104 J. AMERICAN O. SOC. 679 (1984).

¹⁰⁵ Bat Ye’or, *The Dhimmi: Jews and Christians Under Islam* 36 (1985); see Milka Levy-Rubin, *NON-MUSLIMS IN THE EARLY ISLAMIC EMPIRE: FROM SURRENDER TO COEXISTENCE* (2011).

differences in ethnicity, gender, color or culture. Allah, glorified and exalted be He, created all humans from one single unit and made them then into communities and tribes¹⁰⁶ so that they may connect and reach out to each other on the basis of solidarity, mercy and justice. He established fraternity and equality among them in terms of livelihood, community - building, and benefiting from the resources made available to them to perpetrate life, as a general honor graciously imparted by God Almighty on his creation. Indeed, within the fold of the Islamic State since its early days, multiple races and diverse people lived and merged together in the Islamic environment free from any segregation. In the very first generation of disciples we already find, for instance, Salman Al-Farsi, (the Persian ,death 32

¹⁰⁶ Quran chapter 49 (*sūrat l-ḥujurāt*) (49:13) English Translation Yusuf Ali: O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things).

AH/652 or 653 AD)¹⁰⁷ Bilal Al-Habashi, (the Ethiopian) Sohaib Al-Rumi, (the Frank)¹⁰⁸ and so many others.¹⁰⁹

Second: Protecting the fundamental matters for Muslims and non-Muslims alike; that is protecting people's life, religion, intellect, property and honor, in an all-embracing manner to ensure the continuity and integrity of life and its basic components. The issue of minority rights is left open as to the problems relating to sharing neighborhoods in the case of there being many religions living together.¹¹⁰

Third: Refraining from exerting any coercion, thus acknowledging the principle of religious freedom, as illustrated in God's injunction "No compulsion in religion."¹¹¹ Islam indeed gave individuals and communities all types of freedom as

¹⁰⁷ He was raised as a Zoroastrian, then attracted to Christianity, and then converted to Islam after meeting Prophet Muhammad in the city of Yathrib, which later became Medina.

¹⁰⁸ Suhayb the Roman or Suhayb al-Rumi (born c. 587), also known as Suhayb ibn, was a former slave in the Byzantine Empire who went on to become an companion of Prophet Muhammad and member of the early Muslim community.

¹⁰⁹ Akbar Shah Najeebabadi, *HISTORY OF ISLAM* (2001).

¹¹⁰ Bernard Lewis, *THE ARABS IN HISTORY* (1993).

¹¹¹ Verse (ayah) 256 of *Al-Baqara of Quran*, The verse explain the phrase that "there is no compulsion in religion."

long as they do not encroach on religious fundamentals or on the rights of others, including the right to choose one's religion¹¹² and perform freely one's religious rites and worshipping practices, as well as one's social mores, ceremonies, festivities and holidays, for non-Muslims living in the land of Islam.¹¹³

A very important human right is given in Clause 25 of Al Madina Pact, where freedom was guaranteed for each community to practice its own religion. The implication of this clause is that each individual was also free to choose his or her religion, in line with the clear teachings of the Quran.¹¹⁴ These generic and holistic principles that were introduced by Islam, and other such fundamentals of concern to

¹¹² Translation Yusuf Ali, *Quran 2:256* (Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things.) See also, Jacques Berque, *LE CORAN: ESSAI DE TRADUCTION*, éditions Albin Michel (1995), at 63.

¹¹³ Mustansir Mir, *UNDERSTANDING THE ISLAMIC SCRIPTURE*, 54 (2008).

¹¹⁴ "There shall be no compulsion in religion: the right way is now distinguished from the wrong way." (2:256) Note that this statement of complete religious freedom comes immediately after the grandest statement of God's power to be found in any scripture. It is indeed significant!

us here, form the key platform which Islam established for interactions among Muslims and between them on the one hand and other communities and peoples that have not embraced Islam. These are the fundamentals, and whatever diversions a researcher may find across the history of Muslims, were only the result of misinterpretation or cases of erring applications that may have taken place in certain stages in its history.¹¹⁵

IX. APPLICATIONS OF THE ISLAMIC PACT/AL -MADINAH PACT

The Al Madinah Pact includes 47 articles (52 articles in some other calculations), of which the first 23 articles set the rights and duties of Muslims in Madinah, while the remaining articles set the rights and duties of the Jews.¹¹⁶ Al Madinah Pact was written immediately after the migration of the Prophet Muhammad peace be upon him to

¹¹⁵ Wael B.Hallaq, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS (2009).

¹¹⁶ R. B. Serjeant, *Sunnah Jāmi'ah, Pacts with the Yathrib Jews, and the Tahrim of Yathrib: Analysis and Translation of the Documents Comprised in the Called "Constitution of Medina"*(1978).

Madinah.¹¹⁷ Indeed, this pact is considered to be the first civil constitution in history, and historians and Orientalists throughout history have spoken about it. This constitution was designed primarily to regulate the relations among all sects and groups in Al Madinah, principally the immigrants from Makkah (Al Muhajirin) and the local Muslims (Al Anssar), and Jewish tribes and others.¹¹⁸ Many have considered this pact to be one of the prides and glories of Islamic civilization, mainly of its political and humanitarian glories and landmarks.¹¹⁹

The main principles of the Al Madinah pact can be summed up as follows:

- First: The Islamic nation is over the Tribe.
- Secondly: Social solidarity between the factions of the people.
- Third: Deter treacherous of covenants.
- Fourth: Respect for the protection pledge granted by a Muslim.

¹¹⁷ Yetkin Yildirim, *Peace and Conflict Resolution in the Medina Charter*, 18 PEACE REV. 109 (2006).

¹¹⁸ Sh. Muhammad Ashraf, *THE FIRST WRITTEN CONSTITUTION IN THE WORLD* (1968), Frederic G. Kenyon (Translator), *THE AVALON PROJECT* 9 (1996).

¹¹⁹ R. B. Serjeant, *The Constitution of Medina*, 8 ISLAMIC Q. 3 (1964).

- Fifth: protection of dhimmis and non-Muslim minorities.
- Sixth: Ensure Social Security and Blood Money.
- Seventh: The governance reference is Islamic law
- Eighth: Freedom of conscience and worship is guaranteed to all factions of the people.
- Ninth: Financial support for the defense of the State is everyone's responsibility.
- Tenth: Financial independence of every fraction of the people.
- Eleventh: Obligation of common defense against any aggression.
- Twelfth: Advise and mutual righteousness between Muslims and the People of the Book.
- Thirteenth: Freedom of each faction to have alliances that do not harm the state.
- Fourteenth: Obligation to defend the oppressed.
- Fifteenth: Right to security for every citizen.

The requisites of international law in the field of minority rights:

Many international charters speak about rights of minorities, specifically article 27 the International

Covenant on Civil and Political Rights,¹²⁰ and article 30 of the Convention of the Child,¹²¹ and the UN Declaration of 1992 on Minorities Rights,¹²² main minorities rights can be summarized as follow:

- The right to protection against partisanship, segregation or social violence
- The right to equal protection irrespective of one's ethnic or racial origins
- The right for minorities to preserve their culture, their religion and their language.
- The right to benefit from the positive measures adopted by the State to encourage racial integration and promote minority rights.
- The right to seek asylum to flee from persecution based on their race, religion, ethnicity, social affiliation or political opinion.
- The right to appeal legal rulings and to resort to justice.

¹²⁰ International Covenant on Civil and Political Rights, December 16th (1966).

¹²¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November (1989), entry into force 2 September (1990), in accordance with article 49.

¹²² It was adopted by the General Assembly resolution 47/135 of 18 December 1992.

Let us take up these rights one by one, and note along the way the fundamentals therein which tie them to the treatment advocated in Islamic Shari'ah.

A. The Right of Minorities to Protection against Partisanship, Segregation and Racial Violence

Here is an article on general protection rooted in people's commonality in humanity above all. If we refer to the Holy Scripture, we find, Allah's declaration:

“And we have certainly honored the children of Adam and carried them on the land and sea, and provided for them of the good things and preferred them over much of what We have created, with (definite) preference”¹²³ (Quran, Al Isra: 17:70). So this verse of Quran says that respect and honour all human beings irrespective of their religion, colour, race, sex, language, status, property, birth, profession/job and so on.

¹²³ Abdullah Yusuf Ali Trans. *Quran, Al Isra: 17:70*.

God has indeed created all humanity from one single unit and made them into communities and tribes for them to exchange graces and reach out to each other on the basis of solidarity, compassion and justice. God made them into fraternal communities with equal rights to livelihood, to growth and to tapping into the resources made available to them for the perpetuation of life, with no distinction between races, black or white, Muslim or non- Muslim.¹²⁴

This is an inclusive honor bestowed on man by God Almighty, and is apt in its essence to command fair and indiscriminate treatment between the Muslim majority and the non-Muslim minority wherever that may be.¹²⁵

As for individual honoring, it is based on Iman (firm belief in God) and Islam (Submission to God), proceeding from God's saying:

¹²⁴ Mahmoud Ayoub, *Dhimmah in Qur'an and Hadith*, MUSLIMS & OTHERS IN EARLY ISLAMIC SOC'Y Robert Hoyland (Editor) 25 (2004). (Originally published in Lawrence I. Conrad (Editor), THE FORMATION OF THE CLASSICAL ISLAMIC WORLD 18 (2004)).

¹²⁵ Sayed Khatab & Gary D. Bouma, DEMOCRACY IN ISLAM (2007).

“...Indeed, the most noble of you in the sight of Allah is the most righteous of you.”

(Quran, Al Moujadala (9))

or based on knowledge and perception deduced from Allah’s saying”

“... Allah will Raise those who have believed among you and those who were given knowledge, by degrees. And Allah is Acquainted with what you do.”

(Quran, Al Hujurat: 13)

This individual honoring does not clash with the idea of equality at the general level which God Almighty has bestowed on all the masses of people, all descendants of Adam. It is rather a special favor and privilege accorded to the righteous believer and the learned Muslim. As for those who do not belong to the community of Islam, they are still looked upon with God’s encompassing grace and honor accorded to all humans and with full rights under the Islamic

Shariah whose key hallmark is indeed justice, equity and compassion.¹²⁶

Hence, the notion of mutual respect among humans, irrespective of their ethnicity or beliefs, is founded on the spirit of mutuality as advocated in the Quran and as dictated by the requisites of coexistence and communal living, amounting to recognition of the value of the other and of his rights. It is also built on the concept of freewill which God has instilled in man as an innate feature, enjoyed by all in their inter-relations, on an equal footing in their conduct, their labor, their coexistence, their intellectual appreciation, their freedom expression and argumentation.¹²⁷

In the Madinah Pact it is stated that “A neighbor is (to be treated) like, the self, (as long as) he is neither an aggressor nor a trespasser.”¹²⁸ Also, Islam

¹²⁶ Vincent J. Cornell, *RELIGIOUS ORTHODOXY AND RELIGIOUS RIGHTS IN MEDIEVAL ISLAM: A REALITY CHECK ON THE ROAD TO RELIGIOUS TOLERATION*; Michael Igrave (Editor), *JUSTICE & RIGHTS: CHRISTIAN AND MUSLIM PERSPECTIVES* (2009), at 53.

¹²⁷ Allinda Black & June Hopkins (Editors), *Covenant on Civil and Political Rights*, *THE ELEANOR ROOSEVELT PAPERS* (2003).

¹²⁸ R. B. Serjeant, *Sunnah Jāmi'ah, Pacts with the Yathrib Jews, and the Tahrīm of Yathrib: Analysis and Translation of the Documents*

has ensured minorities against any aggression of whatever character. In his book “*Al Furook*” Al Qourafi says:

“If someone is under a Dhimma (Protected status) pact in our land and some enemies come seeking him, we are duty bound to rise to his defense¹²⁹ with every available weapon, even laying our lives in the protection of he who is under such a pact of dhimmahood (protection)”.

B. The Right to Equal Protection Irrespective of Ethnic or Racial Origins

Here we find that Islamic Shari’ah founded its interaction with non-Muslim minorities living in an Islamic State, on the principle of justice and equality, Allah, Exalted be He, says, “O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a

Comprised in the So-called “Constitution of Medina,” 41 BULL. SCH. ORIENTAL & AFRICAN STUD. 1 (1978).

¹²⁹ Provisions of the Dhimmi, Ibn AlQayim Al-Jawziya Report of the 9th Regular Session of the OIC Independent Permanent Human Rights Commission Mohammed Raissouni, *Rights of Minorities in Islam*, IPHRC Member OIC (2013).

people prevent you from being just. Be just; that is nearer to righteousness. And your Allah; indeed, Allah is acquainted with what you do” (Quran, Al Maida: 8).

In this, one finds a clear reference to the need to spread justice and apply its principles to all irrespective of differences in ethnicity or culture, and a clear directive not to be swayed away from justice by any feelings of hatred, offense, disagreements or by the misconduct of some individuals, since justice is posited as a divine injunction that must be honored and enforced. In his book “Koranic Tafsir” (Quranic Interpretations), *Ibn Kathir* states, regarding the above verse that it is meant to establish justice in dealing with the non-believers, and that it applies quite obviously to Muslims as well.¹³⁰

Regarding the idea of banishing injustice to a (peace) covenant – partner (Dhimmi), the Hadith is

¹³⁰ Tafsir Ibn Kathir, *Exegesis of the Grand Holy Qur'an* (4 volumes) by Abu-l-Fidaa' 'Imaadu-d-Deen Isma'eel Ibn 'Umar Ibn Kathir Al-Quraishi Ash-Shafi'i Al-Ash'ari Al-Busrawee Ad-Dimashqi. The unabridged translation was done by Dr. Muhammad Mahdee Ash-Shareef and published by Daaru-l-Kutub 'Ilmiyah, Beirut, Lebanon (2006).

clear, insisting on the right of the said partner to undiminished rights and to full equality with Muslims¹³¹. Also, the Shari'ah law has guaranteed for this group the honoring of every commitment taken with them. Indeed, a Muslim is enjoined to abide by his commitment with others as long as the said commitment does not cause any harm to Muslims – *Ibn Qaiem* (1292–1350)¹³² says: “It was the practice for the Prophet (PBUH) that if any of his enemies entered in a commitment with one of his disciples, provided no harm is entailed for Muslims, he would put his signature to it.”¹³³ Also it is further stated in the Madinah Pact that a person is not to be held accountable for a wrong committed by a covenant-partner of his, but that reaching out to

¹³¹ Sunan Abī Dāwūd 3052, Safwan ibn Sulaym reported: The Prophet, peace and blessings be upon him, said, “Whoever wrongs a person protected by a covenant, violates his rights, burdens him with more work than he is able to do, or takes something from him without his consent, I will be his prosecutor on the Day of Resurrection.” Sahih (authentic) according to Al-Albani.

¹³² Ibn Qayyim al-Jawziyya was an important medieval Islamic jurist, theologian, and spiritual writer. Belonging to the Hanbali school of orthodox Sunni jurisprudence.

¹³³ Muhhamed Al Ghazâli, *FIQH-US-SEERAH: UNDERSTANDING THE LIFE OF PROPHET MUHAMMAD* (2015), at 117.

ensure justice for a wronged person is a duty for all, irrespective of the wronged person's religion.¹³⁴

C. The Right for Minorities to Preserve their Culture, Religion and Language

Here we find that Islamic Shari'ah has guaranteed the right for non-Muslim communities to practice their religious creed and rites, according them religious freedom, proceeding from God Almighty's injunction (No coercion in matters of faith).¹³⁵ This was well epitomized in the message addressed by the Prophet (PBUH) to the People of the Book of the Yemen in which he invited them to Islam in these words: "Whoever chooses to join Islam amongst the Jews or the Christians becomes a member of the Muslim Community of Believers, enjoying equal rights and equal duties, and whoever chooses to stand by his Jewishness or Christianity must not be tempted (away from their beliefs)."¹³⁶ In the Madinah Pact, it is stated that Jews are entitled to

¹³⁴ *Ibid.* Muhhamed Al Ghazâli (2015).

¹³⁵ Verse (ayah) 256 of Al-Baqara of Quran.

¹³⁶ Bernard Lewis, THE JEWS OF ISLAM (1984).

their faith and Muslims to theirs. Likewise, the Najran Pact includes a provision for non-interference in the Christians' religious affairs, as an inviolable right for each and for their dependents.¹³⁷

D. The Right to the Benefit of Positive Measures Taken by the State to Encourage Racial Harmony and Promote Human Rights

When we refer back to Islamic literature we find that it has guaranteed for non-Muslims the right to mutual cooperation and mutual righteous treatment.¹³⁸ This is well illustrated in the prescribed duties to cover the needs of the relatives, to honor one's debts to honor your guest, to forgive even when capable of meeting punishment, to be affable to the incoming, and to provide for the defenseless, ensuring proper livelihood for non-Muslims in the land of Islam, as they form an integral part of its citizenship and as the state is responsible for the

¹³⁷ William Montgomery Watt, *MUHAMMAD: PROPHET AND STATESMAN* (1961).

¹³⁸ K. A. Armstrong, *HISTORY OF GOD: THE 4000 YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM* (1993).

wellbeing of all is citizens.¹³⁹ According to Prophet Mohamed (PBUH) “Each one of you is a steward and each is responsible for (the safety and wellbeing of) those under his stewardship Indeed an Imam (local religious leader) is a steward accountable for the wellbeing of his dependents, the husband is a steward in his family accountable for its wellbeing, etc.”¹⁴⁰

Islam also commands compassion for the weak and the vulnerable among the people of the Book who are affable to (refraining from aggressing) Islam. It also instructs that a share of the Zakat levied from by Muslims be allocated to the People of the Book, as established in the Quran: “The alms are only for the poor and the needy, and for those employed in connection therewith, and for those whose hearts are to be reconciled, and for the freeing of slaves, and for those in debt, and for the cause of Allah and for the wayfarer” (Quran 9:60, Surah Tawbah).¹⁴¹

¹³⁹ Michael Penn, *ENVISIONING ISLAM: SYRIAC CHRISTIANS AND THE EARLY MUSLIM WORLD* (2017).

¹⁴⁰ Abdur Rahman Al-Sheha, *Human Rights in Islam and Common Misconceptions*. Riyadh revised ed. 65. (2012).

¹⁴¹ Abdullah Yusuf Ali, *Quran Translation 9:60* (Alms are only for the poor and the needy, and the officials (appointed) over them, and

By getting married to slaves regardless of their social hardship, Islam encouraged Muslims to value people on other basis than their social class, and henceforth; find a balance between the differences established by the ethnic-tribal system at that time.¹⁴²

Even more admirable than all the above, is the right for the non-Muslim community for proper coverage of their needs from the Islamic State's treasury (Beitulmel) in the case of incapacity, old age or destitution.¹⁴³ This is well established in what Abu Ubeid reported (in his book "Financial Assets") on the authority of Ibn Al Musseib, that "The Prophet (PBUH) offered a 'Sadaqa' (Charity) to a Jewish household, a 'standing' (perpetual) Sadaqa that was offered to them regularly even after his death. Also, in the Madina Pact, it is stated that "The Jews of Beni Awf are to be treated by Muslims as they treat themselves" Protection (when given) in the Name of

those whose hearts are made to incline (to truth) and the (ransoming of) captives and those in debts and in the way of Allah and the wayfarer; an ordinance from Allah; and Allah is knowing, Wise.)

¹⁴² S. Abul Ala Maududi, ISLAMIC L. & CONST. (1997), at 296.

¹⁴³ *Supra* Lewis (1984) at 151.

Allah will be common.¹⁴⁴ The weakest among Believers may give protection (In the Name of Allah) and it will be binding on all Believers.¹⁴⁵

In the Dhimmahood Contract established by Khaled Ibn Al-Waleed for the benefit of the people of Al Hayra in Iraq, who were Christians, one finds the following: (I have taken it upon myself that whoever among them is incapacitated because of old age or ill health, and whoever is stricken by poverty¹⁴⁶ after ease and becomes the receiver of charity from the people of his own faith, shall be exempted from the payment of Jezya (tax) as well as shall enjoy life-coverage from Beitulmel (the Islamic State treasury) for himself as well as for his dependents).¹⁴⁷

¹⁴⁴ Abul Hasan M. Sadeq, *Poverty Alleviation: An Islamic Perspective*, 13 HUMANOMICS 110 (1997).

¹⁴⁵ Clause 14 Madina Charter, Khilafah al-'Alam al-Islami, Full Text of the Madina Charter. [30 November 2007].

¹⁴⁶ Michael Morony, *Religious Communities in Late Sasanian and Early Muslim Iraq*, MUSLIMS & OTHERS IN EARLY ISLAMIC SOC'Y, (Robert Hoyland (Editor)) (2004).

¹⁴⁷ Shadi Hamid, *An Islamic Alternative? Equality, Redistributive Justice, and the Welfare State in the Caliphate of Umar*, 13 RENAISSANCE.

E. The Right to Asylum for Fear of Persecution on Account of One's Race, Religion, Ethnicity, Social Affiliation or Political opinion

Here, Islamic Shari'ah guarantees the right to neighborly succor and to protection: "And if any one of the polytheists seeks your protection, then grant him protection that he may hear the word of Allah. Then deliver him to his place of Safety. That is because they are a people who do not know" (Quran, Al Tawba: 6).

Allah, Mighty and Sublime Be He, tells His Messenger: "And if one of the polytheists seeks your protection" (that is your succor), then do respond to this call for help. Offer them the opportunity to listen to the word of God (that is the Quran of which you may read for him, introducing him to the faith) as a duty on your part, after which you must help him reach a safe place."¹⁴⁸ In other words, after you rescue him and offer him some insights of the word of God, if he still declines your offer to embrace Islam and

¹⁴⁸ S.Abul Ala Mawdudi, THE RIGHTS OF NON-MUSLIMS IN ISLAMIC STATE (1982), at 282.

is not inclined to accept what you.¹⁴⁹ have read out to him from the word of God, then it is still your duty to help him reach a safe place, where he would feel safe from you and from those under your command, until he reunites with his own homeland and people among the unbelievers.¹⁵⁰ This is a command that applies not only to that past era. It is applicable at all times and in all places.

F. The Right to Appeal Before the Court:

Here, Islamic Shari'ah has guaranteed for all non-Muslims living within its borders the right to resort to court under their own law, while still offering them the free option to resort to either their own law or that of Islam.¹⁵¹ *Mohammad Ibn Al Qacem Al Shibani* (749– 805¹⁵²) said: “(If two adversaries among the Dhimma – partners choose on the basis of a common agreement between them, to

¹⁴⁹ *Ibid.*

¹⁵⁰ A. Gauher (Editor), *Islamic Law - Its Ideals and Principles*, CHALLENGE OF ISLAM (1980), at 269.

¹⁵¹ Abdulaziz Abdulhussein Sachedina, *THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM* (2001), at 31.

¹⁵² The father of Muslim international law.

resort to a Muslim judge, the latter may only take up their case after the approval of their priests, failing which, he must refrain. And the same applies in case the priests' approval does not have the consent of both adversaries.”¹⁵³

X. DUTIES TOWARDS NON-MUSLIM / DHIMMIS

In parallel to this, Islam having imparted upon this social category so many rights which honor and dignify them in the land of Muslims, it also required of them. Certain duties which they had to honor on their side, so that society at large may enjoy collective security, symbiosis and peace. These duties include the following:

A. Abiding by the General Terms of Islamic Law

As a matter of fact, there is a need for all non-Muslims living within the fold of the Islamic society

¹⁵³ Sadia Tabassum, *Combatants, Not Bandits: The Status of Rebels in Islamic Law*, 93 I. R. RED CROSS. 121 (2011).

to abide by the same Islamic provisions applicable to Muslims. As long as they have chosen to live within the fold of the Muslim society, it becomes a duty for them to abide by its laws without prejudice to their own creeds and religious freedom. Indeed, under Islam, they are not required to abide by any of the worshiping rites of Muslims, nor are they required to cede any of their civilian or social particulars permitted to them by their religion, even if prohibited by Islam, as in the cases of marriage and divorce and all that has to do with their food and drink.¹⁵⁴ They are also free to practice their religious rites and not to renounce what is permissible under their religion. However, they have (in all collective civil matters) to accept and abide by the law of the state where they are living, under the umbrella of its ruler.¹⁵⁵

B. Be Considerate of the Feelings of Muslims

Non-Muslims living in a Muslim State need also to be considerate of the feelings of Muslims and be

¹⁵⁴ A. A. Maududi, *HUMAN RIGHTS IN ISLAM* (1997), at 236 -37.

¹⁵⁵ *Ibid.* A. A. Maududi at 238-39.

respectful of the dignity of the state under whose umbrella they are living, by being respectful of the Islamic religion and its sanctuaries and refraining from any manifestations likely to offend the feelings of Muslims.

C. Paying Financial Dues

Another requirement for non-Muslims living in a Muslim state is to settle all the required fiscal duties and contributions, in which they are in fact equal to Muslims, in terms of taxes levied on all types of assets, commerce, agriculture and trading. On the level of constitutional rights, however, the Islamic school allows diversity and accepts differences between Muslims and non-Muslims. These differences manifest themselves in the debates about interreligious marriage, inheritance, and giving testimony against a suspect from another religion. In addition, non-Muslims are not required to join the army or serve the state; these may be seen as advantages or restrictions. Yet there is one clear restriction: a non-Muslim cannot be the leader of a

Muslim state. Non-Muslims can occupy any position other than the top leadership.¹⁵⁶

A poll tax (jizya) was levied; in addition, dhimmis (or ahlu-dh- dhimmah, protected people) were prohibited from criticizing the Quran, expressing disrespect to the Prophet or to Islam, conducting missionary activity, or having sexual relations with or marrying Muslim women.¹⁵⁷ From this perspective, dhimmah is a gained right and privilege; it is also the basis of other rights to be gained by virtue of signing a treaty with the Muslim authority. Enjoying legal personhood requires fulfilling the conditions of the treaty. Otherwise, it will be lost. One of the conditions of keeping legal personhood is to pay the special poll-tax, jizya, to the state.¹⁵⁸

¹⁵⁶ A.S. Tritton, *THE CALIPHS AND THEIR NON-MUSLIM SUBJECTS* (1970), at 8.

¹⁵⁷ Michael Morony, *Religious Communities in Late Sasanian and Early Muslim Iraq*, *MUSLIMS AND OTHERS IN EARLY ISLAMIC SOCIETY* (2004).

¹⁵⁸ Muhammad Abdel-Haleem, *The Jizya Verse (Q. 9:29): Tax Enforcement on Non-Muslims in the First Muslim State*, 14 *J. QURANIC STUD.* 72 (2012).

What is Jizyah?

From the perspective of the Islamic school, the jizyah is the fee for dhimmah (protection),¹⁵⁹ which entitles one to inviolability ('ismah), and residence in the Muslim state (sukna). But universalist jurists argue otherwise. For them, dhimmah and 'ismah are not subject to monetary exchange; they are inalienable universal rights that are granted at birth. From this perspective, as Muslims are required to pay zakat and other annual charities and taxes, non-Muslims are also required to pay taxes in the form of jizya. For the Hanafi school, jizya is acceptable from all non-Muslims, including the People of the Book and non-Arab pagans, the only exceptions being Arab pagans and polytheists. For the Shafi'i school, jizya is acceptable only from the People of the Book and Zoroastrians and not from the followers of other

¹⁵⁹ The jizya tax is based on the following verse from the Quran:
Fight those who believe not in Allah
nor the Last Day nor hold that forbidden which hath been forbidden
by Allah and His Messenger,
nor acknowledge the religion of Truth, (even if they are) of the
People of the Book, until they pay the Jizya with willing submission,
and feel themselves subdued (Al-Tawbah 9:29).

religions because the Ouran and hadith did not list them among those who are allowed to make peace with Muslims and pay jizya.¹⁶⁰

D. To Refrain from Causing Prejudice to Religious Sanctities

Anyone living within the fold of the Islamic state enjoys full freedom to practice their own religious rites and are entitled to all the manifestations of their rituals, subject however to steering away from any public manifestations offending Muslims or prejudicing their religion or their Prophet.¹⁶¹

Thus Islam has defined the foundations of peaceful coexistence between Muslims and non-Muslim minorities living within the territories of Islam. It offered thus a template for modalities of dialogue and interplay between Muslims and the followers of other religions, in favor of building a

¹⁶⁰ Qur'an, Al-Tawbah 9:29. Bukhari, *Sahih, Kitab al-Jizya* (297/6); Malik, *al-Muwatta, Jizyat Ahl al-Kitab* (121/1). It is narrated that the Prophet Muhammad took jizya from the Zoroastrians of Bahrain; Umar took it from the Zoroastrians of Iran.

¹⁶¹ Mohammed Raissouni, *Rights of Minorities in Islam*, IPHRC Member OIC.

well-integrated society enjoying peace, security, equality and mutuality, it being known that this has been the subject of a wide spectrum of texts (in the Quran and Hadith) that may be referred on the matter, all of which converge around what we have expounded in terms of the inviolability of the rights of religious minorities in the land of Islam.¹⁶²

E. Axiomatic Principles of Law: Basic Rights in Islam

Irrespective of the above noted discussion about justification of rights in Islamic Law, which grants six basic rights to individuals, whether they are Muslims or non-Muslims. An individual is presumed to be part of a millet organization. However, individuals have rights that are granted to them universally and equally regardless of their religion, race, gender, and culture.

¹⁶² K. El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 *Islamic L. & Soc.* (1994), at 141-187.

These rights are not subject to debate. Therefore, they are termed "axiomatic principles of law" (al-daruriyyat alshar'iyya). They are also known as "the objectives of law" (maqasid al-shari'ah).

These rights are as follows

- 1) the right to the inviolability of life ('ismah al-nafs or 'ismah aldam);
- 2) the right to the inviolability of property ('ismah al-mal);
- 3) the right to the inviolability of religion ('ismah al-din);
- 4) the right to the inviolability of freedom of expression ('ismah al-'aql);
- 5) the right to the inviolability of family ('ismah al-nasl); and
- 6) the right to the inviolability of honor ('ismah al-'ird).

Because these rights are universally granted, minorities also enjoy them. Accordingly, the life, property, religion, mind, family, and honor of all individuals are inviolable, regardless of their inherent, inherited, and acquired qualities such as race, religion, gender, culture, and education. Minorities are allowed to fully practice their cannon law provided that they do not contradict these six

axiomatic principles of Islamic law. In that case they are prevented from practicing those rules that explicitly violate these basic rights. Consequently, Muslim rulers prohibited the practice of *sati* in India.¹⁶³ Similarly, they prohibited the practice of marriage with siblings among some Zoroastrians in Iran.¹⁶⁴

XI. CONCLUSION

Minority rights are fundamental rights derived from the ground rules of international human rights law. These rules dictated the development of protective measures for the rights of these minorities, to ensure that all races and ethnicities that exist in a country, enjoy all the rights enjoyed by the rest of society components, as well as to ensure their participation in development of countries they are in, and to participate in public life, and to protected own

¹⁶³ Sri Ram Sharma, *The Religious Policy of the Mughal Emperor* (1972), at 42-44.

¹⁶⁴ Patricia Crone, *MEDIEVAL ISLAMIC POLITICAL THOUGHT* (2005), at 307.

identities from any damage or harm that may inflict these minorities.

The Islamic world has its own features and uniqueness. It should, however, be kept in mind that the Islamic world is also not a homogenized one. One comes across fundamental differences in Islamic countries from Algeria to Indonesia though all of them follow religion of Islam. Commonality of religion does not necessarily mean commonality of social or political traditions.¹⁶⁵ While these countries have Islam as majorities religion, they do allow all their citizens, including the non-Muslims, equal political and social rights¹⁶⁶. The Islamic tenets, do not disapprove of composite or pluralistic way of life. The Covenant of Medina (called *Mithaq al-Madinah*) clearly approves of pluralistic set up, religious pluralism and composite nationalism.¹⁶⁷

¹⁶⁵ A. Gauher (Editor), *Islamic Law - Its Ideals and Principles*, THE CHALLENGE OF ISLAM (1980), at 269.

¹⁶⁶ Mohamed Suffian Hashim, AN INTRODUCTION TO THE CONSTITUTION OF MALAYSIA (1976). See, Shad Saleem Faruqi, DOCUMENT OF DESTINY- THE CONSTITUTION OF THE FEDERATION OF MALAYSIA (2008), at 341.

¹⁶⁷ Abdulaziz Abdulhussein Sachedina, THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM (2001), at 30-31.

The Prophet clearly set an example himself that people of different faith and traditions can live together in peace and harmony creating a common bond and respecting a common obligation towards the city/country Medina.¹⁶⁸

The Islamic emphasis on law would then lead us to inquire about how classical Islamic Sharia protected the rights of minorities under Muslim rule or whether men and women were given the same rights in the medieval or late medieval period.¹⁶⁹ But Europe, for instance, as late as the seventeenth century, was plunged in fratricidal wars of religion, hardly a model of “religious freedom.¹⁷⁰” In the many centuries before that, as well, European states, starting with the Holy Roman Empire, were famous for discriminating against and at times massacring

¹⁶⁸ Anver Emon, *Reflections on the “Constitution of Medina”: An Essay on Methodology and Ideology in Islamic Legal History*, 1 UCLA J. Islamic & Near Eastern L. no. 103 (2001).

¹⁶⁹ Vincent J. Cornell, *Religious Orthodoxy and Religious Rights in Medieval Islam: A Reality Check on the Road to Religious Toleration* (2009), 53.

¹⁷⁰ Thirty Years’ War, History, <http://www.history.com/topics/thirty-years-war> (accessed on Nov. 2019).

those whose beliefs did not match those of the ruling elites, and the Jews in particular.¹⁷¹

The concept of civil society which respects autonomy of a citizen and his/her religious, cultural and political rights does not, in any way, contradictory to the Qur'anic injunctions. The above analysis has shown that Islam has no clash with the minority rights. The Qur'an clearly states that all children of Adam have been honoured.¹⁷² This of course includes right to live with dignity and to promote one's own religious, cultural and linguistic or ethnic interests. In sum, the rights of minorities in Islam have been guaranteed to ensure a full and comprehensive treatment, within the scope of maintaining all concerned covenants and conventions.

¹⁷¹ Mark R. Cohen, *UNDER CRESCENT AND CROSS: THE JEWS IN THE MIDDLE AGES* (2008).

(a comparative study of Jews in the medieval period under European Christendom and under Muslim rule, showing that the Jews were much better off in Muslim lands).

¹⁷² Abdullah Yusuf Ali, *The Holy Quran*, trs Surah Al-Isra 17:70.